

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**NEXTGEAR CAPITAL, INC.,**  
an Indiana company,  
Plaintiff,

v.

**JOHN YURKOVICH AUTO SALES,  
INC.,** a Michigan company, and  
**JOHN YURKOVICH,** individually,  
Defendants.

Case No. 16-cv-10298

Hon. John Corbett O'Meara  
Mag. Judge Mona K. Majzoub

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**PLAINTIFF NEXTGEAR CAPITAL, INC.'S  
RESPONSE TO ORDER TO SHOW CAUSE [DKT. 18]**

NextGear Capital, Inc. ("NextGear") responds to the April 29, 2016, Order to Show Cause Why This Case Should Not be Dismissed for Failure to Prosecute, as follows:

1. The Complaint was filed on January 28, 2016, alleging that Defendant John Yurkovich Auto Sales, Inc. ("JYAS") failed to timely repay a loan from NextGear, which it used to purchase automobiles it offered for sale and sold. [Dkt. 1].

2. The Complaint also alleged that John Yurkovich ("Yurkovich"), the president and owner of JYAS, was personally liable to NextGear for his guarantee of the loan. [Dkt. 1].

3. On February 1, 2016, the Complaint was personally served on the Defendants, as reflected in the proof of service and affidavit filed on February 2, 2016. [Dkt. 7].

4. On February 12, 2016, the Court entered the order granting NextGear's motion for possession of collateral pending final judgment. [Dkt. 12].

**A. JYAS Files for Bankruptcy Protection On February 29, 2016**

5. On February 29, 2016, before NextGear could arrange to repossess the collateral, either peacefully or with use of the U.S. Marshalls, JYAS filed a Chapter 11 bankruptcy petition in the United States District Court for the Eastern District of Michigan, case no. 16-42857-wsd ("Bankruptcy Action").

6. The filing of JYAS's Bankruptcy Action automatically stayed all action against JYAS under 11 U.S.C. § 362, including this litigation.

**B. Yurkovich Failed to Respond and Default Entered**

7. Defendant John Yurkovich failed to file a responsive pleading in accordance with Fed. R. Civ. P. 12.

8. On March 4, 2016, at the request of NextGear, the Clerk entered a default against Yurkovich. [Dkt. 15].

**C. NextGear Reasonably Prosecuted This Matter Against Yurkovich, and JYAS's Bankruptcy Action Presents Good Cause for any Failure to Prosecute Against JYAS**

9. In the context of dismissal pursuant to Rule 41(b) for failure to prosecute, courts look to four factors for guidance: (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered. *Stough v. Mayville Community Sch.*, 138 F.3d 612, 615 (6th Cir. 1998).

10. Although typically none of the factors is outcome dispositive, it is said that a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct. *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980).

11. NextGear's states that there has not been any unreasonable delay in prosecution of this matter due to willfulness, as any delay has been the result of the Bankruptcy Action and the parties' continued dispute over possession of the collateral which has continued in the Bankruptcy Action.

12. On March 16, 2016, JYAS filed a motion in the Bankruptcy Action for use of collateral [Dkt. 11, Bankruptcy Action], wherein it requested use of the

same collateral which this Court had previously granted possession of to NextGear. [Dkt. 12].

13. After briefs were submitted, the court in the Bankruptcy Action held oral argument on March 23, 2016, during which the parties agreed to allow for NextGear to repossess and hold the collateral in exchange for JYAS's use of other cash collateral.

14. On April 28, 2016, an order was entered in the Bankruptcy Action temporarily lifting the stay to allow NextGear to repossess its collateral.

15. On May 5, 2016, a week after the order was entered, NextGear filed its motion for entry of default judgment against Yurkovich. [Dkt. 19].

16. The deadline to file claims in the Bankruptcy Action is June 29, 2016. (Ex. A, Notice of Order Establishing Deadlines.)

17. NextGear cannot prosecute this matter further against JYAS at this time due to the automatic stay.

18. Upon entry of the default judgment against Yurkovich, and with the continued stay of prosecution against JYAS, there will not be any additional proceedings in this matter until the bankruptcy stay is lifted.

WHEREFORE, Plaintiff, NextGear Capital, Inc. requests this Court to dismiss the show cause order and allow this matter to proceed when the bankruptcy stay is lifted as to John Yurkovich Auto Sales, Inc.

Date: May 9, 2016

Respectfully submitted,

By: /s/ Brad A. Danek

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Attorneys for Plaintiff

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 9, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

By: /s/ Brad A. Danek

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